SUPREME COURT, U. S.

73-230

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. A-1154

NEW JERSEY CITIZENS FOR CLEAN AIR, INC., et al.,

Petitioners,

vs.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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In The

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No. A — 1154

NEW JERSEY CITIZENS FOR CLEAN AIR, INC., ET AL.,

Petitioners,

vs.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

The petitioners New Jersey Citizens for Clean Air, Inc., Save the Meadowlands Coalition, Citizens Committee of Hudson County, Hudson County Citizens for Clean Air, Hudson River Fisherman's Association, Weehawken Environmental Committee, D.E.E.R., Inc., Save the Palisades Association, John Rutherford Chapter of Daughters of the American Revolution, Citizens for Conservation, A.C.T., C.A.P.A.B.L.E., Raritan Valley Environmental Council, Garden Club of Somerset Hills, Hoboken Environment Committee and CAPCOM, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this proceeding on February 5, 1973.

Opinion Below

The opinion of the New Jersey Supreme Court is reported at 62 N.J. 248, 300 A.2d 337 (1973). The findings and recommendations of the Hackensack Meadowlands Development Commission and the New Jersey Department of Environmental Protection are not reported. Copies of the New Jersey Supreme Court's opinion (264a)* and its denial of petitions for rehearing (298a-299a), the relevant sections of the agencies findings of fact and recommendations (244a) and the decision of the Commissioner of the New Jersey Department of Environmental Protection (262a) are set forth in the Appendix at the pages indicated.

Jurisdiction

This suit was brought as an appeal to the New Jersey Supreme Court by direct certification from state administrative agency findings and recommendations arising from environmental hearings ordered by that Court to be held jointly by the Hackensack Meadowlands Development Commission and the New Jersey Department of Environmental Protection in New Jersey Sports and Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972). The judgment of the New Jersey Supreme Court was entered on February 5, 1973. In re Sports Complex in the Hackensack Meadowlands, 62 N.J. 248, 300 A.2d 337 (1973). A timely petition for rehearing was denied on March 6, 1973, and a re-petition for rehearing was denied on May 2, 1973. In view of the uncertainty of which denial begins the 90

* Page numbers suffixed by "a" refer to Appendix.

Jurisdiction

day period within which this petition for certiorari must be filed, an application for a 60 day extension of time to file was made to Justice William G. Brennan, Jr., Circuit Justice for the Third Judicial Circuit. This application was granted, making the new due date for this petition August 3, 1973. This petition was filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).[1]

Questions Presented

1. Whether the construction of a complex source of air pollution, such as proposed in the present case, is illegal in a state whose implementation plan does not provide for review and control of such complex sources to insure that such sources do not cause violations of federal ambient air quality standards as established in the Federal Clean Air Act., 42 U.S.C. Section 1857 et seq. and regulations promulgated thereunder?

2. Whether the construction of a complex source of air pollution, such as proposed in the present case, is illegal in a region in which the above federal ambient air

[1] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under the United States."

quality standards are not currently being met for any automobile related air pollutant, and there is no valid implementation plan preventing the further degradation of current air quality levels?

3. Should this Court reverse a state supreme court decision affirming state agency findings, when said decision may jeopardize petitioners' substantive and procedural rights under the Federal Clean Air Act, 42 U.S.C. Section 1857 et seq. by allowing construction of the proposed complex sports which may cause violations of federal ambient air quality standards, and said decision can be shown to be unsupported by either the evidence presented or the factual and legal propositions relied upon by the state court in making its affirmance?

Statutory Provisions Involved

Clean Air Act, an amended, 42 U.S.C. Section 1857 et seq.

As the provisions involved are lengthy, they are set out in the Appendix at 1a together with pertinent regulations. The statute may be found at Volume 9 of the United States Code, page 10178 (1970 ed.).

New Jersey Sports and Exposition Authority Law, N.J.S.A. 5:10-1 et seq.

This statute is also set out in the Appendix at 73a.

Statement of the Case

Introduction

This suit concerns the construction of a massive sports complex in the Hackensack Meadowlands in Northeastern New Jersey. At this time, it is proposed that the complex include a football stadium and a horse race track. Future development of a "theme park," (such as Disneyland) is contemplated. There is to be a parking facility for 25,000 cars and 400 buses for the football stadium and race track; this has been guaranteed in the lease between the defendant New Jersey Sports and Exposition Authority and the New York Giants, a professional football team, which is to be the prime user of the football stadium. The stadium will contain 75,000 seats. The Chairman of the Sports Authority has stated it is hoped that other activities, besides football, will keep these 75,000 seats filled on a year round basis. See discussion of third reason for granting the writ, infra.

The Meadowlands are a low lying, coastal wetlands area not served by such mass transit facilities as trains or subways. Thus, when any event takes place at the complex that will even partially fill the 25,000 car parking lot, thousands of cars will travel from the New York City metropolitan area, resulting in hundreds of thousands or perhaps millions of vehicular miles traveled in the area surrounding the sports complex for each event. At the stadium itself, up to 25,000 cars will have to enter and leave one central point within the space of a few hours. This entrance and exit will have to be accomplished over what is currently a quite sparse road network surrounding the site.

Statement of the Case

The air quality in the area of the sports complex site is currently among the worst in the nation with regard to automobile related pollutants. The air quality presently exceeds federal levels for carbon monoxide, hydrocarbons, nitrogen oxides, oxidants and particulates (Excerpts from Draft Impact Analysis, 300a-301a). According to the testimony of the Sports Authority's own expert, federal levels will still be exceeded for all five pollutants in 1975 when the sports complex, if approved, would begin operating (T. XXIV F2-F4). It is so poor that the Administrator of the United States Environmental Protection Agency has imposed, pursuant to the requirements of the Federal Clean Air Act, a transportation control plan to reduce the vehicular miles traveled in this area 68% by 1977, a plan which the Administrator himself deems to be severe and perhaps unworkable. This is because there is very little mass transit available in this area and the area's day to day existence revolves around the automobile. See generally, 38 Fed. Reg. 17782 et seq. (July 3, 1973) (140a).

The plan has been criticized from many quarters, particularly by Richard J. Sullivan, Commissioner of the New Jersey Department of Environmental Protection, because of the severe hardship it would impose on citizens living in this area. Commissioner Sullivan has also according to recent newspaper reports, apparently taken the position that the plan cannot legally be imposed, and that even a 68% reduction in vehicular miles traveled could not achieve the 1975 primary air quality standards. See New York Times, June 23, 1973 and July 19, 1973 (311a-314a).

Statement of the Case

This background should be considered with the fact Commissioner Sullivan, who now says that the federal ambient air quality standards cannot be achieved in this area, was the same state official who approved the hearings being challenged here and made possible a facility that will draw up to 25, 000 cars from perhaps hundreds of miles away an undetermined number of times per year.

The statute that created the New Jersey Sports and Exposition Authority (hereinafter Sports Authority) which will build and operate the sports complex, the New Jersey Sports and Exposition Authority Law, N.J.S.A. 5:10-1 et seq., set forth in the Appendix at 73a, was attacked by numerous groups in New Jersey Sports & Exposition Authority v. McCrane, 61 N.J. 1, 292 A.2d 545 (1972) (hereinafter McCrane). Petitioners were granted leave to appear in McCrane as amicus curiae to represent interest of the petitioning organizations in the air quality aspects of the case. [2] The

[2] This grant of standing by the New Jersey Supreme Court to the organizations and its members includes petitioners' standing to raise federal issues under Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Section 304 of the Clean Air Act, 42, U.S.C.A. Section 1857h-2 provides expressly that certain types of citizen suits may be brought under certain guidelines. However, subsection (e) thereof provides that that section shall not restrict any right any person may have under any statute or common law to seek any relief, including relief against the Administrator or a state agency. Giving this section the liberal construction required by the National Environmental Policy Act, 42 U.S.C.A. Section 4321 et seq., it should be seen that this section preserves rights to sue to protect rights created under the Act, so long as the Act does not specifically regulate a given type of suit because of the expected frequency of litigation thereof. The Supreme Court of New Jersey has

(Cont'd)

constitutionality of the statute was upheld, but the Court noted that Sections 5(x) and 23 of the statute required that the Sports Authority "consult" with the Hackensack Meadowlands Development Commission and the New Jersey Department of Environmental Protection (hereinafter Agencies) so that the sports complex would not prevent the maintenance and preservation "of the delicate environmental balance of the Hackensack Meadowlands . . . " McCrane, 61 N.J. at 32, 292 A.2d at 561. Accordingly, the Court ordered environmental hearings to be held, from which a record should be compiled so that review of those hearings could be taken directly to the New Jersey Supreme Court to determine the adequacy thereof. At these hearings, petitioners raised the issue, inter alia, of the applicability of the Federal Clean Air Act, as amended, 42 U.S.C. Section 1857 et seq. (hereinafter "Act") to this undertaking. In ordering the hearings, the New Jersey Supreme Court intended that they result only in the selection of a site for the sports complex that would be least environmentally damaging. However, the Court later noted that consideration of the issues arising under the Act had been proper.

(Cont'd)

determined in its opinion below that rights under the Act may be protected in a state suit challenging the construction of traffic generating facilities, and the vital purpose of the Act would be frustrated if the right of citizens to sue on causes of action unspecified in the Act were disallowed. Moreover, while this specific action does not involve a federal official or agent, the liberal standing requirements of Sierra Club v. Morton, supra, as recently restated in Interstate Commerce Commission v. SCRAP, 41 L.W. 4866 (Sup. Ct. 6/18/73), that plaintiffs or their members properly plead that they have been injured in fact, have been met in this case.

> "A considerable part of the hearing was concerned with projections of the impact of the complex on air quality from the broad point of view of the public health . . . our remand was sufficiently comprehensive to include the broader issue and the hearing agencies rightly concerned themselves with it."

Opinion at 5, 300 A.2d at 340 (269a).

At the hearings it was established that operation of the sports complex would result in concentrations of carbon monoxide well above the one-hour standard of 35 parts per million (ppm) set by the Clean Air Act as the level above which health may be endangered. Thus one expert testified that using the authority's own computer model, 18,000 cars using the complex in 1975 would cause carbon monoxide concentrations of 76 ppm in the center of the proposed parking lot. (T. XX, B-3, B-4). Another witness drew a sketch showing that almost all areas of the parking lot would exceed 35 ppm if 22,500 vehicles used the lot (Ex. A-16). In adddition, the unrebutted testimony established that federal levels for nitrogen dioxide would also be exceeded (T. XVI, D-6).

The Authority's own expert confirmed this testimony. His computer predictions showed concentrations of 115 ppm for 25,000 cars and 102 ppm for 18,330 cars (Ex. SA-34). In spite of this evidence, the Agencies found that federal clean air standards would not be violated. The following, however, should be considered:

Statement of the Case

1. The Sports Authority itself indicated that federal clean air standards for all five pollutants (three automobile-related) measured by the New Jersey Department of Environmental Protection (one of the hearing agencies) in the general area of the sports complex were already well above the annual average standards allowed by the Act and regulations thereunder (Excerpts of Draft Impact Analysis, 300a-302a). Thus, even if the Agencies were correct in their findings that one hour standards for carbon monoxide would not be exceeded, they took the position that further degradation of already unhealthy air was permissible.

2. The Sports Authority's expert himself said that primary standards could be violated if his suggested traffic controls were not utilized. The controls have not been made mandatory (T. XXV, G-14 to G-20; 213a-218a).

It would thus appear that in addition to the disputed facts, the evidence put forth by the Sports Authority itself and the findings of the Agencies indicate that federal standards are currently being violated, and as such, any additional pollution could only exacerbate a presently unhealthful and unlawful condition.

Petitioners also raised the point during the hearings that the implementation plan (hereinafter "Plan") required by the Act, 42 U.S.C. Section 1857c-5 et seq. to be formulated by the State and approved by the United States Environmental Protection Agency (hereinafter "E.P.A.") did not take into consideration the sports complex or the development of the

Hackensack Meadowlands in general.[3] The Act and regulations thereunder require that such an implementation plan must provide for the review by the State of complex sources of auto-related air pollution and the imposition on such sources of land use and transportation controls necessary to insure the ability of the State to attain and maintain federal air quality standards. 42 U.S.C. Section 1857c-5(a)(2)(B) and (D) (16a); 40 C.F.R. Section 51.1(n); 38 Fed. Reg. 6279 (March 8, 1972) (117a); 38 Fed. Reg. 9599 (April 18, (1973) (128a).

The Agencies' findings and recommendations were approved, with modification irrelevant to this appeal, by the Commissioner of the New Jersey Department of Environmental Protection on October 16, 1972. The findings and approval were appealed to the New Jersey Supreme Court, which heard oral argument on December 18, 1972.

The Court affirmed the Agencies' findings and the Commissioner's approval thereof on February 5, 1973. In re Sports Complex in Hackensack Meadowlands, 62 N.J. 248, 300 A.2d 337 (1973). As to the applicability of the Act to the sports complex, the Court said "Certainly the Sports Authority will be subject to the Federal Clean Air Act" (Opinion at 7; 300 A.2d at 340; 271a). It approved the Agencies' findings that the federal air quality standards would not be violated in 1975. Id. It also recognized that the primary

3 A "new city" is contemplated in the Meadowlands with a population of 185,000 and employment for 200,000 people (T. XVI C-8).

responsibility for assuming that these standards would be met and maintained was on the State through its Implementation Plan, and that "New Jersey has adopted such a plan which has been approved by the Federal Administrator" (Opinion at 8; 300 A.2d at 341; 271a).

Another major basis of the Court's judgment was that:

> "The record indicates that the National Emissions Standards Act (42 U.S.C.A. Section 1857 f-1 to f-8) mandates virtual elimination of emissions of carbon monoxide in all automobiles manufactured during and after model year 1975 . . . . In the development and operation of the sports and exhibition complex the Authority must conform to these (federal air quality) standards."

Opinion at 8; 300 A.2d at 341; 271a-272a).

The Court thus rested its judgment that the construction and operation of the sports complex would not be in violation of the Act on three bases:

1) That the citizens of the state were protected from violations of the Act by an approved, valid state implementation plan.

2) That the federal emission limits imposed on new cars in 1975 would be met.

3) The Agencies' findings that the air quality standards would not be violated.

On February 15, 1973, petitioners submitted a timely petition for rehearing indicating that the state's plan had never been approved in several respects, notably in its control plan for nitrogen dioxide. In addition, there was no plan for carbon monoxide and photochemical oxidants since the state had received a two year extension to 1977 to submit a plan as to these pollutants. (Petition for Rehearing at 5; 277a). Moreover, the petition went into some detail to show that the approval for all major automobile related air pollutants rested on two year extensions of the deadline for meeting the standards. The petition then pointed out that all plans with such extensions, including New Jersey's, were invalidated by the United States Court of Appeals, District of Columbia Circuit, on January 31, 1973, in Natural Resources Defense Council, Inc., et al. v. Environmental Protection Agency, 475 F.2d 968 (D.C. Cir. 1973)(hereinafter N.R.D.C.) (Petition for Rehearing at 7; 279a). This was because the Administrator of the E.P.A. had acted beyond his statutory authority in granting these extensions. The Court ordered that the states involved resubmit plans which met the statute's requirements. The petition for rehearing also pointed out to the Court that according to a number of highly respected scientific reports and to statements of the auto makers themselves the 1975 automobiles would probably not meet the 1975 emissions standards. This petition was denied on March 6, 1973.

On March 8, 1973, the Administrator of the E.P.A. published an announcement at 38 Fed. Reg. 6279 (117a) disapproving all state implementation plans to the

extent that they did not provide for review of and legal authority for the control of complex sources of air pollution, which specifically include sports complexes. Requirements for what state implementation plans must provide for review of such sources were proposed at 38 Fed. Reg. 9599 (April 18, 1973) (128a) and made final in an announcement at 38 Fed. Reg. 15834 (June 18, 1973), to be effective on June 18, 1973. The argument was then pressed in a repetition for rehearing submitted on the basis of this clarifying regulation that the sports complex could not proceed without being subject to the review and controls required under the Act and regulations thereunder. This repetition was submitted on March 19, 1973 and denied on May 2, 1973. At that time, appellants were preparing a memorandum to the Court on the effect of yet another development which eroded the validity of its decision. The E.P.A. gave a one year extension, until 1976, to the auto makers to comply with the 1975 emission standards, see 38 Fed. Reg. 10317 (April 26, 1973) which the Court had assumed would be met in 1975 (Opinion at 8; 300 A.2d at 341; 271a-272a). This memorandum was never submitted because the Court's denial of the second petition for rehearing came before the memorandum was filed.

Before proceeding to show that the federal questions here presented were properly raised and preserved in the state proceedings, the nature of these proceedings should be understood. The hearings below were ordered to be held by the New Jersey Supreme Court because of a mandate in the state statute that the Sports Authority "consult" with the Agencies to

determine the site within the Meadowlands that would be the least environmentally damaging. When petitioner suggested that the agencies should determine whether there should be a sports complex at all, Special Counsel for the Agencies, who presided over the hearings, stated that he thought there would be a sports complex somewhere in the Meadowlands, and stated, "The question is today whether or not this particular site is environmentally acceptable" (T. I, 85; 202a). The Court itself noted that the decision to locate the sport complex in the Meadowlands had been made by the New Jersey legislature and the Court felt it could not question the wisdom or policy of that decision (Opinion at 56; 300 A.2d at 340; 266a).

While petitioners raised the issues the Act presented in this context at the hearings, and the New Jersey Supreme Court approved the Agencies' consideration of these issues, it seems clear that the intended function of the agencies was one of fact finding only. While legal issues were raised tangentially below, they could not be properly decided except on the appeal to the state supreme court. As will be seen, infra, while the Agencies had a limited fact finding function only, their findings were intertwined with questions of law.

The matter was further complicated by the fact that the court specified no procedures by which legal issues, federal or otherwise, were to be raised and presented to that court, and there are no state statutes or rules of court that provide procedural guidelines in this unique context. Thus, the questions presented here were formally presented to the New Jersey Supreme Court in petitioners' Brief, Supplemental Brief, and Petitions for Rehearing. In view of this, petitioners have requested

the clerk of the court to certify its briefs along with the record.

Following is a summary of the questions presented and the manner in which they were raised and decided:

1. The question of the necessity of consideration of the sports complex pursuant to a valid implementation plan was raised repeatedly below in testimony at the hearings. On cross examination of a Sports Authority expert, a letter from the E.P.A. to Governor Cahill was read to the witness indicating that the E.P.A. wanted current development information for the Meadowlands for purposes of review of the plan. The letter indicated that of special importance were development plans for the period prior to and immediatley following 1975 (T. VIII. D-10; 202a-203a). The witness was responsible for a "draft impact assessment," that purported to show the environmental impact of the complex in the area. The question was in the context of whether this assessment considered how the sports complex would affect New Jersey's ability to implement its responsibilities under the Act (T. VIII, D-14; 204a). An expert witness for petitioners, an official of the E.P.A. office having jurisdiction over the Hackensack Meadowlands area, said that New Jersey's plan did not include the sports complex or general development of the Meadowlands. Specifically, he said that the traffic effects of the complex would be needed to determine whether New Jersey's Plan would be adequate to insure compliance with the federal standards (T. XVIII, C-1 to C-13; 204a-213a).

Petitoner's Statement of Exceptions and Objectons to the Hearing Officer's Report and Recommendations, specifically recounted this testimony in objecting to the agencies findings with regard to the Act (219a).

In Point III of petitioners' main brief to the New Jersey Supreme Court, contending that completion of the sports complex would violate rights created under the Act, the statute, its legislative history, and regulations promulgated thereunder were examined in considerable detail in arguing that the Act itself required that the sports complex was subject to the Act. It was further argued that the Act required that the sports complex must be subject to the imposition of land use and transportation controls that would prevent the sports complex from causing pollution levels in excess of federal standards (Pb at 85-96; 224a-236a). This point was further treated in more detail in a supplementary brief the Court allowed petitioners to submit to clarify issues that had arisen at oral argument.

The Court treated the issue of the sports complex compliance with requirements under the state's plan and the validity of that plan with the statement that "New Jersey has adopted such a plan which has been approved by the Federal Administrator" (Opinion at 8; 300 A.2d 341.

On March 8, 1973, the Administrator of the E.P.A. published at 38 Fed. Reg. 6279 an announcement that all state implementation plans, including New Jersey's,

> "must be disapproved to the extent that they do not contain provisions which will permit the review, and provide the authority to prevent the construction, modification, or operation of complex sources at a location where emissions associated with such source would result in violation of a national standard or the States control strategy" (120a).

It was argued in a petition for rehearing submitted on March 19, 1973 that this had the effect of clarifying prior law and supporting the contentions made earlier by the petitioners that the Act itself mandated that the sports complex could not legally proceed because the state did not have a plan that would have insured that the sports complex would not cause violations of the federal standards. In other words, the requirements of this regulation should have applied to some projects begun before the promulgation of the regulation, because it was an interpretation of the terms of the statute, which were binding on projects begun subsequent to the amendments to the Act of 1970, which would include the sports complex. This petition was "duly considered" by the Supreme Court and denied on May 2, 1973.

2. The evidence presented by the Sports Authority (Draft Impact Analysis, 300a) and the disapproved state implementation plan itself (201a-1 et seq.), indicate that several federal ambient air quality standards were currently not being met. Petitioners argued that the policy of nondegradation of existing qualities of air established by Sierra Club v. Ruckleshaus, 344 F. Supp.

253 (D.D.C. 1972), aff'd__U.S. ___, 93 S.Ct..__, 31 L.Ed. 2d 636, 41 LW 4825 (June 11, 1973), applied to prevent further degradation of air that was already in violation of federal air quality standards. (See Pb 90 et seq.; 229a et seq.) That this was a proper interpretation of that policy is supported by a transportation control plan that has been imposed on New Jersey by the Administrator of the E.P.A. because of the State's continued failure to propose one of its own, announced at 38 Fed. Reg. 17782 (July 3, 1973; 140a). That plan proposes that no new parking facilities may be located in the New Jersey portion of the New Jersey-New York-Connecticut Interstate Air Quality Control Region (in which the sports complex is to be located) without a permit. No such permit may issue where this would result in an increase in vehicular miles traveled "within any area the air quality of which fails to meet applicable federal air quality standards" 38 Fed. Reg. at 17790; (181a). This is clearly applicable to the instant case, and the Sports Authority has obtained no such permit.

When New Jersey's Implementation Plan was invalidated, petitioners requested in the Re-petition for Rehearing, further consideration of this question in light of the fact that there was no longer an approved plan; Sierra Club v. Ruckelshaus decided that degradation of current air quality could not be allowed in such a plan.

3. The question of whether the operation of the sports complex would cause violations of the federal air quality standards was raised repeatedly by petitioners in the hearings below. The opinion of the New Jersey Supreme Court should suffice: "A considerable part of

the hearing was concerned with projections of the impact of the complex on air quality from the broad point of view of the public health .... It is also argued that projections of air pollution emanating from the completed project indicate that standards established under the Federal Clean Air Act (42 U.S.C.A. Section 1857, et seq.) will be violated ...." Opinion at 5-6; 300 A.2d at 340; 269a). The court affirmed the Agencies' findings which stated that the standards would not be violated, applying a standard of judicial review requiring petitioners to show that the findings had been palpably arbitrary (Opinion at 4; 300 A.2d at 337; 267a; McCrane, 292 A.2d at 561). Point II of petitioners' main brief argued in some detail that a proper scope of judicial review and application thereof required a reversal of the findings below. In addition to disputed questions of technical facts, the Brief pointed out, inter alia, that the Agencies knew, but did not consider that standards were already being exceeded and that they did not consider the impact of the complex on the surrounding region (Pb. 64-84; 221a-223a).

The question of whether the New Jersey Supreme Court should reconsider its decision in light of the fact that its premise that the citizens of the State were protected by a valid implementation plan had been subsequently eliminated by a Federal Court was put to the Supreme Court in a timely petition for rehearing on February 15, 1973, which was denied on March 6, 1973.

Reasons for Granting the Writ

I.

THE STATE COURT DECISION ALLOWING THE CONSTRUCTION AND OPERATION OF THE SPORTS COMPLEX CONFLICTS WITH THE FEDERAL CLEAN AIR ACT AND IS IN VIOLATION OF PETITIONERS' RIGHTS THEREUNDER.

Under the Act, every state was required to have an implementation plan which should have been approved by the E.P.A. by May 30, 1972.[4] Under N.R.D.C., supra, previously approved plans for several states were invalidated and new ones were required to be submitted and approved no later than April 15, 1973. Under the E.P.A.'s announcement of March 8, 1973 at 38 Fed. Reg. 6279 all state plans were disapproved to the extent that they did not contain provisions for the review and control of complex sources necessary to insure that they would not "result in a violation of a national standard or the State's control strategy." The States must resubmit plans which do contain such provisions no later than August 15, 1973. However, a valid plan may not be in force until as late as December 15, 1973. See Fed. Reg. 9599, 9600 (April 18, 1973).

4. All state plans were to be submitted to the E.P.A. by January 30, 1972. 36 Fed. Reg. 15486 (August 14, 1971). The Administrator was to approve or disapprove the plans within four months of that date. 42 U.S. C. Section 1857c-5(a)(2). If any plans were unsatisfactory, the Administrator was to take actions to insure the delinquent states were covered by proper plans as soon as possible. 42 U.S.C. Section 1857c-5(c).

Reasons for Granting the Writ

The Act created a substantive right to a minimum standard of clean air guaranteed to every citizen. See Pb. 88; Sen. Rpt. No. 91-1196 on National Air Quality Standards Act of 1970 at 4. It appears that the Act also created a "procedural" right for every citizen that complex sources of air pollution, the construction, modification, or operation of which might violate the citizen's substantive clean air rights, must be governed by a plan which would prevent such a violation. This right came into existence on May 30, 1972, on the date the Act requires that all plans must be approved. Petitioners contend that the sports complex is a complex source,[5] the construction, modification, or operation of which was commenced during a period in which such sources should have been controlled by a valid plan, and cannot proceed without violating these procedural and substantive rights enjoyed by petitioners and the public.

The state court failed to enforce these important federal rights, even though they are designed to protect public health, and approved this state project. Not only is the decision erroneous, but unless this court speaks

5. The term "complex source" includes (but is not limited to)

1. Shopping centers;
2. Sports complexes;
3. Drive-in theatres;
4. Parking lots and garages;
5. Residential, commercial, industrial, or institutional developments;
6. Amusement parks and recreation areas;
7. Highways;
8. Sewer, water, power, and gas lines.

38 Fed. Reg. 6279, 80 (March 8, 1973).

out, and affirms the very basic principle that federal law is to be obeyed, it is likely that states will ignore federal law (perhaps on authority of this case, if unreversed) in favor of local projects.

In this regard it should be noted that there are two actions presently pending which could have a substantial effect on this case and petitioners' rights thereunder. On July 26, 1973, a complaint was filed in the United States District Court for the District of New Jersey in which three individuals, Marianne Wuillamey, Barbara Eisler and James Drago are plaintiffs and David A. Werblin, director of the Sports Authority, and Richard J. Sullivan, commissioner of the New Jersey Department of Environmental Protection are defendants. This suit seeks to enjoin construction of the Sports Complex on the grounds that there is an unconstitutional inconsistency between the Federal Clean Air Act and the New Jersey Sports and Exposition Authority Act. In addition, the issue of the failure of the Sports Authority to obtain a permit is raised. A copy of the Complaint is set forth in the Appendix at 319a.

Also on July 26, 1973, a letter was sent on behalf of some of the petitioners herein to the Acting Administrator of the E.P.A. demanding that the agency take action to halt the sports complex for violation of the federally imposed traffic control plan requiring a reduction of vehicular trip miles in the northern New Jersey area. This letter (also set forth in the Appendix at 315a) is the notice required by Section 304 of the Clean Air Act, 42 U.S.C. Section 1857h-2(h), 40 C.F.R.

Section 54.1 et seq., preparatory to a citizen suit against the administrator.

It is submitted that both of these actions can, if adversely determined, provide additional and reinforcing reasons why this court should grant this petition, and it is therefore respectfully requested that decision on this petition be withheld until determination of the pending actions.

On the other hand, a favorable decision on these cases could make a ruling on this petition unnecessary.

II.

BECAUSE OF THE FREQUENCY WITH WHICH FACTUAL FINDINGS WILL BE MADE BY STATE AGENCIES UNDER THE CLEAN AIR ACT, THIS COURT SHOULD DETERMINE A PROPER STANDARD OF JUDICIAL REVIEW.

As noted, supra, the Act and regulations thereunder provide that if any complex source is to be located in an area where it might cause violations of air quality standards or impair the state's control strategies, the state's implementation plan must provide for review of such complex sources to insure that this does not occur. This review will be carried out by state officials or agencies; the E.P.A. is involved only to the extent of approving the Plan's provisions for the review. Thus, environmental hearings of the general type held below

will be required to be carried out in the future in every state.[6]

As such, there will be frequent and recurrent conflicts between the economic interests of promoters of the complex sources on one hand and the interests of the public in not having their health and welfare endangered by violations of clean air standards on the other.[7] Given the kinds of projects that may be involved in such hearings, the state and their agencies will often be under intense political and economic pressure to conduct pro forma reviews and impose minimal land use and transportation controls on these projects with consequent peril to the rights of the public.[8] The victims of this pressure will be the general

6. Petitioners stress that this statement does not imply in any way that the hearings below were adequate to satisfy the procedural requirements of the Act. These were highly unstructured proceedings which were not approved for adequacy by the E.P.A. as required by the Act. Petitioners argued below that these hearings, although extensive, were not adequate by any standard for any purpose.

7. The Administrator has promulgated national primary and secondary ambient air quality standards. The primary standard is a point beyond which air pollutants may not be concentrated without impairing the public health; the secondary standard protects the public welfare. 42 U.S.C. Section 1857c-4(b); 36 Fed. Reg. 8186 (April 30, 1971).

8. The present case could be considered a good example of this danger. The bill creating the Sports Authority was presented to and passed by the New Jersey legislature and signed by the governor in one day. The Supreme Court of New Jersey had to

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public who will thereby lose their federal rights to healthy and nondestructive air. The national importance and implications of these conflicts are clear.

Even though the reviews mandated by the Act are to protect federal rights that will be substantially if not completely identical throughout the United States, it appears that the Act does not specifically provide a uniform standard of judicial review and does not authorize the Administrator to establish one. See Act, Section 110, 42 U.S.C. Section 1857c-5 (15a). The Act provides specifically for citizen suits in the federal district courts in given situations that do not appear to include challenges to reviews made by state agencies. Act, Section 304, 42 U.S.C.A. Section 1857h-2. However, that section also provides that

> "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including

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order the Agencies to conduct hearings. Even then, despite the fact that the Court had expressly provided for direct review by it of the Agencies' findings, McCrane, 62 N.J. 1 at 33, 292 A.2d at 561 (1972), the Sports Authority proceeded full tilt and broke ground over two weeks before the oral argument. The day before oral argument, the Newark Star Ledger carried a front page article describing progress on the extensive development planned for the sports complex area. The Court indicated considerable displeasure with these developments at oral argument (305a-310a).

relief against the Administrator of a State Agency)."

42 U.S.C.A. Section 1857h-2(e) (64a).

This section may be construed to indicate that most or all judicial review of the state agency reviews of complex sources will have to be in the state courts. As matters stand at this point, then, without determination by this court, proceedings to protect uniform federal statutory rights will be subjected to judicial review under perhaps fifty or more different standards.

The standard of judicial review with which petitioners would have to contend to challenge the Agencies' findings in this case was that such findings be "palpably arbitrary." McCrane, 61 N.J. 1, 33, 292 A.2d 545, 561 (1972). While not specifically mentioning this standard, Justice Hall, concurring in part and dissenting in part, in the opinion ordering the hearings, said:

> "I agree with the majority as to the necessity for this precedent agency hearing and determination. What disturbs me is the tone of the opinion in speaking of it. I gain the impression therefrom that while the agencies must go through the motions, the proceeding can be a perfunctory, cut and dried one, with a foreordained result, with which no court would disagree." [9]

9. Justice Hall followed this immediately with an observation that is highly pertinent to the question of how closely hearing of this

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61 N.J. 1, 65, 292 A.2d 545, 578 (1972).

In formulating a minimum standard of effective judicial review and, if need be, reviewing the factual basis of agency findings below, this Court would be well within the precedent of analogous measures it has taken in the past.

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sort should be scrutinized.

> "Perhaps my alarm is accentuated by the majority's quotation from legislative committee testimony in support of the act, and especially that of the Director of the Department of Environmental Protection -- the state official having the duty to see to the protection of the environment -- stating as one reason for approval of the Authority act that the sports complex 'would help to give our State a little identity of its own.' This to me is not in keeping with the obligation of his office."

It is to be particularly noted that the Department of Environmental Protection, which this offical directed, was one of the hearing agencies below and he approved the Agencies' findings. This observation by a member of the reviewing court itself, coupled with the fact that that official is generally recognized as a vigilant protector of New Jersey's environment, is pursuasive evidence of the need to apply a liberal standard of judicial review when findings by the agency might run afoul of strong political and economic pressures to complete a project.

In this regard, it should be considered that administrative agency decisions that are quasi- legislative and quasi-judicial are invalid if based in whole or in part by political pressures. D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), citing 2 K. Davis, Administrative Law, Sections 12.01 et seq.

Reasons for Granting the Writ

In Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943) the Court considered the Federal Employees' Liability Act, which created statutory federal rights in a broad class of employees to sue their employers in state courts. Because different judicial procedures in different states would lead to differing enjoyment of a federal right, the Court established a standard of evidence, which, if attained, would compel the submission of the case to the jury. A correct and uniform application of the FELA was also deemed necessary to protect federal rights thereunder and thus justified a review of the facts therein by the court in Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1950) and Southern Pacific Co. v. Gileo, 351 U.S. 493, 76 S.Ct. 952, 100 L.Ed. 1357 (1956).

Under these particular circumstances, a court's ability to review facts made by state administrative agencies rather than courts to insure that valuable federal rights were being accorded an adequate level of judicial review would be appropriate. The theory of judicial deference to findings of fact by administrative agencies, as required by statutory mandate and sound judicial practice, rests on the assumption of experience and expertise in those agencies in determining questions of specialized facts which courts do not have. Gunther v. San Diego and Arizona Eastern Railway Co., 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed. 2d 308 (1965). As noted, supra, it is unclear at this point what state agencies or officials will conduct reviews of complex sources. It is only clear there will be many of them in many

jurisdictions. It is, therefore, quite uncertain what their level of expertise will be. Given the importance of the rights involved and the uncertainty of the level of protection they will receive, this court should consider means of providing adequate protection for them though relatively liberal judicial review of factual findings.

III.

WITH REFERENCE TO THE INSTANT CASE, A REVIEW OF THE AGENCIES' FACTUAL FINDINGS IS APPROPRIATE BECAUSE: a) THE AGENCIES DID NOT CONSIDER CERTAIN LEGAL QUESTIONS THAT AFFECTED THE VALIDITY OF THEIR FINDINGS; b) THE FINDINGS WERE NOT BASED ON SUBSTANTIAL EVIDENCE; AND c) THE INTENDED USE OF THE PROJECT IS GREATER THAN PRESENTED TO THE AGENCIES.

a. The validity of the Agencies' factual findings were based on legal questions not considered.

The Agencies determined that the sports complex would not cause violations of the Act. However, they were well aware that all automobile-related air quality standards were currently being violated, and would be through 1990 (Excerpts of Draft Impact Analysis, 300a-303a). Petitioners raised the point that new sources of pollution could not be introduced that would exacerbate existing violations (Pb 90 et seq.; 229a et seq.). This point is supported by Sierra Club v.

Ruckelhaus, 344 F. Supp. 253 (D.D.C. 1972), aff'd ___ U.S.____, 93 S.Ct.___, 37 L.Ed. 2d 140 (1973) which established a policy of non-degradation of existing qualities of air. This point was argued in the New Jersey Supreme Court. Thus, the Agencies' findings that the Act would not be violated was a finding of law as well as fact. Also the Sports Authority's own expert witness, under redirect examination by counsel for the Authority, said that it was possible that the one-hour primary standard would be exceeded more than once per year, in violation of law, unless certain traffic control measures he advocated were taken (T. XXV, G-14 et seq.; 213a-218a). These were not required by the Agencies as a condition of approval: the hearing officers merely required "study". The policy of the Act is that transportation controls which can be implemented to prevent violations must be within the state's legal authority to impose to insure that such violations will not take place. The Agencies thus made the factual-legal findings that mere "study" was adequate to insure maintenance of air quality standards. Of course, such legal questions and mixed questions of law and fact do not enjoy the immunity from judicial review that do findings of fact supported by substantial evidence. See generally, 4 K. Davis, Administrative Law Treatise, Sections 30.01 to 30.14.

b. The Agencies' findings were not based on substantial evidence.

The Agencies accepted the Sports Authority's experts' computations of what air pollution levels at the

sports complex would be in 1975. However, basic fundamental data from which these computations were made, projected emission levels of smog-controlled cars as they aged, were taken from another individual who got them from an E.P.A. employee in North Carolina on the phone, who in turn got them from incomplete test results from a study being run by a private firm in California (T. XXII, C-2 to C-10). Without even exploring the issues of whether admission of such evidence denied a fair hearing to petitioners (which issues were argued in the state supreme court), petitioners challenged the reliability of such evidence. At the very least such unsubstantiated evidence was the only basis for the prediction of pollution concentrations made by the authority's expert witness. Certainly, such evidence is not the sort that should determine such vital issues as are presented here. Even assuming such shaky basic data to be correct, petitioners established that the Sports Authority's expert's calculations were incorrect on an independent ground, and he made recalculations on the witness stand, on a sheet of paper entered in evidence that established petitioners' contention that air quality standards would be violated.

c. The Agencies were not presented data on the full use of the facility.

The evidence presented by the Sports Authority to the Agencies was based only on use of the football stadium for the ten home games expected to be played there each autumn. However, newspaper reports of remarks made by the Chairman of the Sports Authority,

David Werblin, indicate that it is the intention of the Sports Authority to utilize the stadium to the greatest extent possible. "With good management we will have this stadium filled every day of the year." Home News (New Brunswick, N.J.), May 31, 1973, pg. 6.

> "Unfortunately, there has been an impression that we're building a facility for nine home football games. If I were a betting man, which I am, I'd bet that by 1980 there will be more soccer games than professional football games in the stadium.
>
> 'We're considering bringing in college football teams like Notre Dame for a game or two and Alabama for a game or two. The sightlines will be perfect for tennis. There are track and field and bowling, and we'll consider putting a bubble over part of the stadium and moving in parallel grandstands for boxing. There will be sport shows, dog shows . . .
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> * * *
>
> 'There are facilities that have 450 uses a year, notably in Anaheim, Calif., and I hope we'll have something going on here almost every day.' "

New York Times, June 1, 1973, p. 29.

It thus seems apparent that the Sports Authority

was quite hesitant to present all the evidence to which it was privy through its Chairman. It seems clearly apparent that the agency findings below were not consistent with the overwhelming weight of the evidence which, in good faith, should have been presented, and this Court certainly has power not only to invalidate the hearings for their insufficency, but to make a contrary finding of fact. See Koppers, Co. v. United States, 24 Ad. L. 2d (Pike & Fisher), 900 (Ct. Cl. 1968).

IV.

WHEN THE ANSWERS TO THE SUBSTANTIVE QUESTIONS PRESENTED HERE ARE RESOLVED, AND IF CONSTRUCTION AND OPERATION OF MANY OF THE NATION'S COMPLEX SOURCES ARE FOUND TO BE IN VIOLATION OF THE ACT, THERE WILL BE A CLEAR AND PRESSING NEED FOR A UNIFORM RULE ON WHAT THE APPROPRIATE REMEDY FOR A GIVEN VIOLATION WOULD BE.

That an injunction against construction or operation issue until there were adequate assurances to the enjoining court that no violations would occur would seem the logical remedy. This has been found to be an appropriate measure involving many large scale projects under the National Environmental Policy Act, 42 U.S.C.A. Section 4321 et seq.

However, if it should be determined that injunctions are not an appropriate remedy to apply as a matter of

course, guidelines could be established for making as a condition precedent to the completion of projects a requirment that plans be altered to include the transportation controls envisioned by the Act incorporated into the on going project.

Of course, this petition is not the place to discuss in detail the mechanics of proper remedies. However, this is an important question that could be handled in further detail in a subsequent brief should the prayer for certiorari be granted.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

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